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In The

Supreme Court of the United States

October Term, 1991

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA, and its affected members,

Petitioner,

v.

CITY OF SACRAMENTO, COUNCIL OF THE CITY OF SACRAMENTO, and DOES 1-20,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF OREGONIANS IN ACTION LEGAL CENTER IN SUPPORT OF PETITIONER, COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA

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This motion of Oregonians In Action Legal Center for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 37. Consent to the filing of this brief has been granted by counsel for petitioner; this consent has been lodged with the Clerk of this Court. Consent has been granted by counsel for the City of Sacramento and the Council of the City of

Sacramento; this consent has been lodged with the Clerk of this Court.

Oregonians In Action Legal Center is a statewide, nonpartisan, nonprofit Oregon corporation deeply involved in test case litigation seeking protection for the constitutional rights of landowners, thereby countering excessive land use regulation. It is financed entirely through voluntary contribution of time and money from individuals, families, businesses, and foundations on a continuing basis.

Oregonians In Action Legal Center is motivated by the firm belief that private landowners should not bear burdens that in all fairness and justice should be borne by the public, a concept reiterated by Justice Scalia in *Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n.4 (1987). Oregonians In Action Legal Center is also motivated by a strong belief that reasonable protection for private property is essential to maintain the resource allocation and efficiency functions of our market system. Moreover, Oregonians In Action Legal Center agrees with Justice Stewart that the protection of private property is essential to maintain all other civil rights protected by the U.S. Constitution. *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972).

In this proceeding, Oregonians In Action Legal Center seeks to augment the arguments in the petition for certiorari by highlighting 1) the adverse impacts on landowners in Oregon which have arisen from the decision of the Court of Appeals for the 9th Circuit, and 2) the need

to clarify and strengthen constitutional protection for private property. Oregonians In Action Legal Center believes the decision of the 9th Circuit is incorrect and poses a serious threat to property rights.

For the foregoing reasons, Oregonians In Action Legal Center requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: April 24, 1992

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of Oregonians In Action Legal Center.

STATEMENT OF THE CASE

Oregonians In Action Legal Center adopts the Statement of the Case set forth in the Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

Oregonians In Action Legal Center is deeply concerned over judicial decisions with precedential value in Oregon that fail to properly construe Justice Scalia's majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In view of Oregon's oppressive land use regulatory system, adopted in 1973, private property rights in the state have been, and will continue to be, trampled under foot by regulators unless it is clearly established that the Takings Clause of the Fifth Amendment requires a precise fit between the burdens generated by development and the exactions on development imposed by government. The decision of the Court of Appeals for the Ninth Circuit misconstrues both the nexus required by Justice Scalia, and the variables between which that nexus must be established.

In *Commercial Builders*, Judge Schroeder first concluded that the decision of the City of Sacramento was not unconstitutional because "The burden assessed against the developers . . . bears a *rational relationship* to a public cost closely associated with such development." *Commercial Builders v. Sacramento*, 941 F.2d 872, 874 (9th Cir. 1991) (emphasis added). She then went on to hold:

> *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it

> can be shown that the development is directly responsible for the social ill in question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the *problem that the exaction seeks to address*, the exaction cannot be upheld. *Id.* at 875 (emphasis added).

In essence, Judge Schroeder held there must only be a rational relationship between the exaction imposed on a development and the government interest sought to be advanced by the exaction. Such a construction is contrary to this Court's opinion in *Nollan*.

The *Nollan* majority's holding on the nexus requirement was clearly delineated by Justice Scalia, responding to the dissent of Justice Brennan:

> Even if the [California Coastal] Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," *post* at 862, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a

> condition to the lifting of a land use restriction * * * . *Nollan*, 483 U.S. at 840-841 (emphasis in original).

Notwithstanding the fact that the California Coastal Commission's determination did not meet even a rational relationship test, *Id.* at 838, this Court made it apparent in *Nollan* that a heightened level of scrutiny must be applied in determining the constitutionality of development exactions. The Court of Appeals for the Ninth Circuit disregarded this principle.

This Court also held that the exaction had to be related to the public need or burden that a proposed development creates or to which it contributes. *Id.* at 838. This was aptly illustrated by Justice Brennan's dissent: "The Court's insistence on a *precise fit between the forms of burden and condition on each individual parcel* along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate." *Id.* at 847 (emphasis added). He later characterized the *Nollan* court's opinion as an "[U]nusual demand for a precise match between the condition imposed *and the specific type of burden on access created by the appellants.*" *Id.* at 849 (emphasis added). The Ninth Circuit's opinion also disregarded this principle.

This Court's rules for when a development exaction will pass constitutional muster have been misinterpreted, and the improper holdings of *Commercial Builders* given deference, in Oregon. The Oregon Supreme Court misconstrued this Court's *Nollan* opinion in *Department of Trans. v. Lundberg*, 312 Or. 568, ___ P.2d ___ (1992). The case dealt with the constitutionality of a sidewalk dedication ordinance imposed by the city on the owners of

commercial property. After citing to *Nollan*, and following a lengthy discussion of the city's dedication ordinance, the Oregon Supreme Court concluded "The requirement of sidewalk dedication *reasonably relates* to commercial development by providing pedestrian access and mitigates the negative impact of any proposed commercial use by buffering both the pedestrian and commercial use from the vehicle use." *Id.* at 577-578 (emphasis added). Even though the court went on, based on the facts of the case, to conclude "The ordinance substantially furthers these purposes," *Id.* at 578, the court's holding on the nexus required was "reasonably related." That construction is contrary to this Court's nexus standard in *Nollan*.

A recent decision by the Oregon Land Use Board of Appeals (LUBA) also adopted an improper construction of the *Nollan* holding. The Land Use Board of Appeals is an Oregon hearings body created to hear and decide appeals of quasi-judicial and legislative land use decisions of local governments. Its decisions are appealable to the Oregon Court of Appeals. In *Dolan v. City of Tigard*, ___ Or. LUBA ___ (LUBA No. 91-161, February 7, 1992), the Land Use Board of Appeals ruled on a case concerning the constitutionality of exactions to dedicate property for a greenway and pedestrian and bicycle pathways as conditions of redevelopment approval of commercial real estate.

That board held:

> *Nollan* does not establish a new, stricter standard for the relationship required between the impacts or burdens of a proposed development and exactions imposed as conditions of development approval.

> Thus, we agree with respondent [city] that the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking if it has a "reasonable relationship" to the impacts of or needs generated by the proposed development. *Id.*, slip op. at 14.

Furthermore, the board's opinion relied directly on the opinion of the Court of Appeals for the Ninth Circuit in *Commercial Builders:* "We, therefore, agree with . . . the Ninth Circuit Court of Appeals' statement in *Commercial Builders v. Sacramento, supra,* that *Nollan* does not establish a new, stricter standard for the relationship required between the impacts or burdens of a proposed development and exactions imposed as conditions of development approval." *Id.*, slip op. at 13. This reliance on *Commercial Builders* and misconstruction of the nexus required by this Court in *Nollan,* resulted in the Land Use Board of Appeals holding that the city did not take an unconstitutional exaction in the petitioners' property solely because the city had established a reasonable relationship between the dedication exactions and the impact of the petitioners' proposed redevelopment of their commercial real estate.

In view of the constructions of the nexus requirement in Oregon, it is of great importance to the citizens of this state that this Court grant the Petition for Certiorari, and establish uniformly that a precise fit is constitutionally required between an exaction, and the burdens or impacts of proposed development, in order to meet the Court's nexus standard.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit holding the City of Sacramento's ordinance did not take an unconstitutional exaction should be reversed by this Court. As Judge Beezer of the Ninth Circuit said, writing in dissent of the opinion of the majority in *Commercial Builders*, "Sacramento would have developers pay not just for public improvements necessitated by development, but for private subsidies with little or no causal connection to development." *Commercial Builders*, 941 F.2d at 877 (Beezer, J. dissenting). As long as the *Commercial Builders* opinion stands, the federal district courts in the states of the Ninth Circuit, in general, and the state courts and hearings boards of Oregon, in particular, will continue to allow local governments unfairly to impose exactions on developments to secure public benefits that should be underwritten instead by taxpayers. The decision, if not reversed, will become a precedent that could have widespread adverse impacts on property rights not only throughout the state of Oregon but also throughout the entire western United States.

DATED: April, 1992.

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